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IXL Learning, Inc. (formerly Quia Corporation)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

QUIA CORPORATION, a Delaware corporation,

Plaintiff,

vs.

MATTEL, INC., a Delaware corporation;
FISHER-PRICE, INC., a Delaware corporation,

Defendants.

CASE NO. CV 10-1902-JF (HRL)

**JOINT WITNESS LIST; BRIEF
SUMMARIES OF EXPECTED
TESTIMONY AND TIME ESTIMATES**

Pre-Trial Conf.: July 15, 2011

Time: 11:00 a.m.

Place: Courtroom of the Hon. Jeremy
Fogel, Courtroom 3, 5th Floor

Pursuant to the Court's Standing Order Re: Pretrial Preparation, the parties hereby submit the following Joint Witness List With Brief Summaries of Expected Testimony and Time Estimates.

I. Plaintiff IXL Learning, Inc.'s Witness List:

1. Paul Mishkin:

Direct Examination: 3 hours

Cross Examination: 2 hours

Mr. Mishkin, the CEO and President of IXL Learning, Inc., will testify, inter alia, about the history of the company, the development of the IXL Learning Program, the selection of the IXL name for the Learning Program, the decision to apply for the IXL trademark, the registration of the mark, the advertising and marketing of the IXL Learning Program, the customers of the IXL Learning Program, revenues associated with the IXL Learning Program, plans for expansion—including an English service and mobile applications—by IXL Learning, Inc., licensing negotiations between IXL Learning and Rand McNally, future considerations regarding licensing of IXL, instances of confusion between the IXL Learning Program and iXL Learning System, the commercial and conceptual strength of the IXL trademark, the proximity of the IXL Learning Program and the iXL Learning System including a comparison of the relative features, the sophistication of consumers of the IXL Learning Program and the harm that IXL Learning has suffered as a result of defendants' infringement of the IXL trademark.

2. Jennifer Gu:

Direct Examination: 1.5 hour

Cross Examination: 0.75 hour

Ms. Gu, a Senior Vice President of IXL Learning, Inc. will testify, inter alia, about the sales, marketing and advertising of the IXL Learning Program, a description of the customers of the IXL Learning Program and the accounting and financial reporting of IXL Learning.

3. Joseph Kent:

Direct Examination: 1 hour

Cross Examination: .50 hour

1 Mr. Kent, the Chief Technology Officer of IXL Learning, Inc., will testify, inter alia,
 2 about the collection and preservation of emails from third parties which evidence a likelihood
 3 of confusion, IXL Learning's efforts to improve its Search Engine Optimization, metrics to
 4 evaluate the effectiveness of those efforts and to otherwise track traffic to and from the
 5 www.ixl.com website,

6 4. Karen Bettucchi:

7 Direct Examination: 0.10 to 0.25 hour

8 Cross Examination: .25 hour

9 Ms. Bettucchi, Technical Support Manager of IXL Learning, Inc., will testify, inter alia,
 10 about a January 6, 2011 telephone inquiry from an individual in New Jersey inquiring about
 11 how to install additional programs on an iXL Fisher-Price handheld device.

12 5. Jessica Blatnik:

13 Direct Examination: 0.10 to 0.25 hour

14 Cross Examination: .25 hour

15 Ms. Blatnik, a Senior Sales Consultant at IXL Learning, Inc. will testify, inter alia,
 16 about specific instances in which while interviewing job candidates, the candidates made
 17 statements to her and/or asked questions which indicated they were confused as to the
 18 connection or affiliation between the IXL Learning Program and the iXL Learning System.
 19 Ms. Blatnik will also testify about a conversation she had with a teacher at a National Council
 20 of Teachers conference in which the teacher asked her if IXL Learning was the Fisher-Price
 21 iXL.

22 6. Kevin Davis:

23 Direct Examination: 0.10 to 0.25 hour

24 Cross Examination: .25 hour

25 Mr. Davis, a Sales Consultant at IXL Learning, Inc., will testify, inter alia, about a job
 26 interview he conducted during which the candidate indicated his understanding that, based upon
 27 internet research, IXL Learning was affiliated with Fisher-Price.

1 7. Kayla Johnson:

2 Direct Examination: 0.10 to 0.25 hour

3 Cross Examination: .25 hour

4 Ms. Johnson, a Customer Service Associate at IXL Learning, Inc., will testify, inter alia,
5 about a telephone conversation he had with a customer who was searching the
6 www.Target.com website looking for the Fisher-Price iXL and was confused between the IXL
7 Learning Program and the iXL Learning System.

8 8. Kathleen Kiely:

9 Direct Examination: 0.10 to 0.25 hour

10 Cross Examination: .25 hour

11 Ms. Kiely, Senior Marketing Coordinator at IXL Learning, Inc., will testify, inter alia,
12 about a telephone conversation she had with a customer in which the customer asked if IXL
13 Learning produced the iXL Fisher-Price handheld device. The customer indicated that, based
14 upon her internet research, she though IXL Learning produced the iXL Learning System.

15 9. Amanda Stender:

16 Direct Examination: 0.10 to 0.25 hour

17 Cross Examination: .25 hour

18 Ms. Stender, a Sales Consultant at IXL Learning, Inc., will testify, inter alia, about a
19 telephonic job interview she conducted in which a candidate asked about IXL Learning's
20 relationship with Fisher-Price.

21 10. Sharoni Finkelstein:

22 Direct Examination: 0.50 hour

23 Cross Examination: .25 hour

24 Ms. Finkelstein is counsel for IXL Learning, Inc. Ms. Finkelstein will offer testimony to
25 authenticate certain of IXL Learning's trial exhibits, including screenshots of various websites
26 and photographs taken at various retailers of the iXL Learning System.

27 **Note:

1 The following six individuals are all employees of either Fisher-Price or Mattel. Each
 2 was deposed in this action and resides beyond the range of a trial subpoena. IXL Learning
 3 plans to present testimony from these witnesses by way of deposition during its case-in-chief.
 4 Defendants have indicated that they plan to counter-designate additional testimony and then
 5 present live testimony from each of these witnesses during their case-in-chief. IXL Learning
 6 will then cross-examine the witnesses based upon their live testimony.

7 With respect to Ms. Saffiudin and Mr. Raina, a significant amount of the deposition
 8 testimony will be introduced to authenticate Fisher-Price internal documents such as Fisher-
 9 Price memoranda and emails.

10 In order to save trial time, IXL Learning proposed the following stipulation to
 11 defendants:

12 Plaintiff IXL Learning will agree to significantly reduce the amount of deposition
 13 testimony it will introduce through these witnesses-- especially with respect to the
 14 authentication of documents--and will instead cross-examine the witnesses after defendants
 15 present their direct testimony during defendants' case-in-chief. To the extent IXL Learning
 16 introduces deposition testimony, defendants will retain the right to object on the grounds of
 17 cumulative testimony during cross-examination. In exchange, defendants will agree: (1) to
 18 stipulate to the authentication of documents produced in this litigation, especially those that are
 19 marked "Highly-Confidential: Attorneys' Eyes Only," (2) that the scope of IXL Learning's
 20 cross-examination of these witnesses will not be limited by the scope of their direct
 21 examinations, and (3) that they will not make a directed verdict motion until after the
 22 completion of these witnesses' testimony.

23 Defendants are still considering IXL Learning's proposed stipulation.

24 The estimates for these witnesses' direct examination is based upon the time to play
 25 excerpts of their video-taped depositions.

26 11. Shehnaz Saffiudin (by deposition):**

27 Direct Examination: 2.0 hours

28 Cross Examination: ____ hour

Ms. Saffiudin, Fisher-Price's primary Rule 30(b)(6) designee, will testify, inter alia, regarding the research and design of the iXL Learning System, her knowledge regarding the selection of the name "iXL" for the Learning System, the marketing and advertising of the product, Fisher-Price's market research into what meaning, if any, customers ascribe to the name "iXL," Fisher-Price's expansion of the functionality of the iXL Learning System into Internet downloads and links to third party websites for additional content, the features which consumers consider in purchasing the iXL Learning System and competitors of the iXL Learning System.

12. Nagendra Reina (by deposition):**

Direct Examination: 1.5 hour

Cross Examination: ____ hour

Mr. Raina, will testify, inter alia, regarding the research and design of the iXL Learning System, her knowledge regarding the selection of the name "iXL" for the Learning System, the marketing and advertising of the product, Fisher-Price's market research into what meaning, if any, customers ascribe to the name "iXL," Fisher-Price's expansion of the functionality of the iXL Learning System into Internet downloads and links to third party websites for additional content, the features which consumers consider in purchasing the iXL Learning System and competitors of the iXL Learning System.

13. Kathleen Kremer (by deposition):**

Direct Examination: 1.0 hour

Cross Examination: ____ hour

Ms. Kremer will testify, inter alia, regarding the research and design of the iXL Learning System, her knowledge regarding the selection of the name "iXL" for the Learning System, the marketing and advertising of the product, Fisher-Price's market research into what meaning, if any, customers ascribe to the name "iXL," Fisher-Price's expansion of the functionality of the iXL Learning System into Internet downloads and links to third party websites for additional content, the features which consumers consider in purchasing the iXL Learning System and competitors of the iXL Learning System.

14. Diane Gambino (by deposition):**

Direct Examination: 1.0 hour

Cross Examination: ____ hour

Ms. Gambino will testify, inter alia, regarding the research and design of the iXL Learning System, her knowledge regarding the selection of the name “iXL” for the Learning System, the marketing and advertising of the product, Fisher-Price’s market research into what meaning, if any, customers ascribe to the name “iXL,” Fisher-Price’s expansion of the functionality of the iXL Learning System into Internet downloads and links to third party websites for additional content, the features which consumers consider in purchasing the iXL Learning System and competitors of the iXL Learning System.

15. Michelle Zimmer (by deposition):**

Direct Examination: 1.0 hour

Cross Examination: ____ hour

Ms. Zimmer will testify, inter alia, regarding the research and design of the iXL Learning System, her knowledge regarding the selection of the name “iXL” for the Learning System, the marketing and advertising of the product, Fisher-Price’s market research into what meaning, if any, customers ascribe to the name “iXL,” Fisher-Price’s expansion of the functionality of the iXL Learning System into Internet downloads and links to third party websites for additional content, the features which consumers consider in purchasing the iXL Learning System and competitors of the iXL Learning System.

16. Brian Erickson (by deposition):**

Direct Examination: 1.0 hour

Cross Examination: ____ hour

Mr. Erickson, a Senior Vice President of defendant Mattel, Inc. and the sole Mattel Rule 30(b)(6) designee, will testify, inter alia, regarding Mattel’s involvement in the research and design of the Fisher-Price iXL Learning System, Mattel’s involvement in the production, marketing, advertising and sale of the iXL Learning System, Mattel’s involvement in the selection and adoption of the iXL name, Mattel’s trademark search in January 2010 regarding

1 the IXL trademark, Mattel's application for trademark registration of the IXL name—including
2 the content of the application, Mattel's abandonment of the application in April 2010 and
3 Mattel's re-filing of a new trademark application for IXL.

4 17. Dr. Henry Ostberg:

5 Direct Examination: 1.5 hour

6 Cross Examination: 1.25 hour

7 Dr. Ostberg will testify about: (1) his qualifications and experience in the field of
8 consumer and survey research; (2) the survey he conducted to determine whether or not there is
9 a likelihood of reverse confusion as to source or affiliation between Plaintiff IXL Learning's
10 IXL Learning Program and defendants' iXL Learning System among parents and teachers of
11 children in Pre-K to the eighth grade; (3) the bases for his conclusion that there was a net
12 likelihood of reverse confusion of 14% between Plaintiff's IXL Learning Program and Fisher-
13 Price's iXL Learning System, after adjusting for a control; and (4) criticisms of the opinions
14 and testimony of defendants' designated expert, Dr. Itamar Simonson.

15 18. David Drews:

16 Direct Examination: 1.5 hour

17 Cross Examination: 1.25 hour

18 Mr. Drews will testify regarding: (1) his qualifications and experience in the field of
19 measuring damages in Intellectual Property cases; (2) the investigation and analysis he
20 undertook to determine if, and to what extent, Plaintiff IXL has suffered damage as a result of
21 defendants' infringement of the IXL trademark; (3) his opinions regarding the measurement and
22 quantification of the damages Plaintiff IXL Learning has suffered; (4) the amount of unjust
23 enrichment defendants have obtained as a result of their infringement of Plaintiff's IXL
24 trademark; and (5) his criticisms of the opinions and testimony of defendants' retained expert,
25 Krista Holt.

19. Allison Druin:

Dr. Druin will testify about: (1) her qualifications and experience in the field of computer-human interaction and the use by children of technology; (2) the impact of technology convergence and mobile learning on the relatedness of educational content and the technology through which it is accessed, and the nature of the extensive work Dr. Druin's University of Maryland computer-interaction lab is doing in this field (with educational entities like Sesame Workplace and public television) and how this relates to the relatedness of online learning programs and hand-held learning devices; (3) the similarities in content and other aspects between the learning systems in issue from the perspective of the user and parent; (4) the perception by children and their parents of the use by Fisher-Price of iXL as it impacts on Plaintiff; and (5) her criticisms of the opinions and testimony of defendants' designated expert, Dr. Douglas Clements.

Direct Examination: 1.25 hour

Cross Examination: 1 hour

20. Peter Kent:

Direct Examination: 1.25 hour

Cross Examination: 1 hour

Mr. Kent will testify about: (1) his qualifications and experience in the field of search engine optimization; (2) the online impact of defendants' use of the iXL name on Plaintiff; (3) his criticisms of the opinions and testimony of defendants' designated experts Shari Thurow and Itamar Simonson.

21. Wes Anson:

Direct Examination: 1.0 hour

Cross Examination: 1 hour

Mr. Anson will testify about: (1) his qualifications and experience in the field of trademark/brand licensing; (2) the nature of licensing and its impact on consumer perceptions about licensed brands and co-branded products; (3) Plaintiff's IXL mark as a brand and its potential for licensing into educational products, including children's hand-held learning

1 systems (4) why consumers are likely to perceive defendants' use of iXL as being connected
 2 with Plaintiff and its IXL learning system, and (5) his criticism of the opinions and testimony of
 3 defendants' designated expert Dr. Itamar Simonson.

4
 5 **II. Defendants Mattel, Inc. and Fisher-Price, Inc.'s Witness List:**

6 Pursuant to the Court's Standing Order Regarding Pretrial Preparation, Section C(1),
 7 Defendants submit the following list of witnesses likely to be called at trial, other than solely for
 8 impeachment or rebuttal. A brief statement summarizing the substance of the witnesses'
 9 testimony is also included. Defendants reserve the right not to call certain of these witnesses
 10 and further note that the pending motions before the Court may obviate or curtail the need to
 11 present testimony from certain of the witnesses.

12 1. Shehnaz Safiuddin:

13 Direct Examination: 1.5 hour

14 Cross Examination: 1.0 hour¹

15 Background and history on Fisher-Price and its brands; operations at Fisher-Price;
 16 product lines; development of the iXL product; the process for selection of names at Fisher-
 17 Price; the conception and selection of the iXL name, and the process followed; functionality
 18 and content of Fisher-Price iXL hardware and software; consumer testing and focus groups;
 19 bringing the product to market; marketing and advertising; retail distribution; Fisher-Price's
 20 website; relationships and interactions with customers; internal testing and studies; target
 21 consumers; other testimony bearing on the lack of likelihood of confusion with Quia's math
 22 website; and sales and expenses.

23 2. Russ Coddington:

24 Direct Examination: 1.0 hour

25 _____
 26 ¹ Plaintiff notes that, with respect to the Fisher-Price and Mattel employees who were
 27 deposed (Safiuddin, Raina, Kremer, Erickson, Zimmer and Gambino) its time estimates for
 28 cross-examination are in addition to the time estimates for the reading of deposition testimony
 during its case-in-chief. Should Defendants agree to the proposed stipulation, Plaintiff will
 revise its time estimates.

1 Cross Examination: 1.0 hour

2 Background and history on Fisher-Price and its brands; operations at Fisher-Price;
3 process for bringing products to market; development of the iXL product; the process for
4 selection of names at Fisher-Price; the conception and selection of the iXL name, and the
5 process followed; management of same; marketing and advertising; internal testing and studies;
6 relationships with retail customers; other testimony bearing on the lack of likelihood of
7 confusion with Quia's math website; retail distribution; and sales and expenses.

8 3. Nagendra Raina:

9 Direct Examination: 1.0 hour

10 Cross Examination: 0.75 hour

11 Fisher-Price's product lines; development of the Fisher-Price iXL product; the process
12 for selection of names at Fisher-Price; the conception and selection of the iXL name, and the
13 process followed; functionality and content of iXL hardware and software; consumer testing
14 and focus groups; bringing the product to market; marketing and advertising; Fisher-Price's
15 website; internal testing and studies; target consumers; other testimony bearing on the lack of
16 likelihood of confusion.

17 4. Brian Erickson:

18 Direct Examination: 0.75 hour

19 Cross Examination: 0.50 hour

20 Background on Fisher-Price and Mattel; corporate relationships; Mattel's involvement
21 with the Fisher-Price iXL product; retailer relationships and the retail channel; marketing and
22 advertising; sales; and corporate policies.

23 5. Michelle Zimmer:

24 Direct Examination: 0.75 hour

25 Cross Examination: 0.50 hour

26 Background on Fisher-Price; online marketing and advertising for the Fisher-Price iXL
27 product; social media/viral marketing campaign; Fisher-Price website; and other testimony
28 bearing on the lack of likelihood of confusion.

1 6. Diane Gambino:

2 Direct Examination: 0.75 hour

3 Cross Examination: 1.0 hour

4 Background on Fisher-Price; software development; functionality and content of the
5 Fisher-Price iXL hardware and software; discussion of the various Fisher-Price iXL software
6 titles; use of licensed characters and entertainment properties on software; and other testimony
7 bearing on the lack of likelihood of confusion.

8 7. Kathleen Kremer:

9 Direct Examination: 1.0 hour

10 Cross-Examination: 1.0 hour

11 Background on Fisher-Price; consumer testing and focus groups; the development and
12 consideration of the iXL product and product concepts and design; testing regarding the name;
13 functionality and content of iXL hardware and software; and other testimony bearing on the
14 lack of likelihood of confusion.

15 8. Krista Holt:

16 Direct Examination: 1.0 hour

17 Cross Examination: 0.75 hour

18 Expert testimony regarding Fisher-Price's sales, expenses, and profits and analysis of
19 any asserted monetary damages. Expert testimony rebutting Mr. Drews' testimony.

20 9. Shari Thurow:

21 Direct Examination: 1.0 hour

22 Cross Examination: 0.75 hour

23 Expert testimony explaining search engine rankings and factors that cause changes in
24 those rankings; prevalence of Plaintiff in search engine queries and resulting traffic; differences
25 in the keywords that drive traffic to the parties' respective websites or information about the
26 parties' respective products/services; third party websites that result from searches for ixl and
27 variations thereof; various search engine queries and their results, and her findings; user search
28

tendencies on Google and other search engines; Plaintiff's search engine optimization; the parties' keyword purchases. Expert testimony in rebuttal of Mr. Kent's testimony.

10. Itamar Simonson:

Direct Examination: 1.0 hour

Cross Examination: 0.75 hour

Expert testimony regarding no likelihood of confusion among relevance consumers; his survey and findings; sophistication of consumers using the Google search engine; discussion criticizing Plaintiff's evidence of alleged "actual confusion." Expert testimony in rebuttal of Mr. Ostberg and Mr. Anson's testimony.

11. Douglas Clements (rebuttal only witness):

Direct Examination: 0.75 hour

Cross Examination: 0.75 hour

Expert testimony in rebuttal of Ms. Druin's testimony.

12. Paul Mishkin:

Direct Examination: 0.75 hour

Cross Examination: 0.5 hour

Background on Plaintiff; background on www.ixl.com; Plaintiff's selection of the name IXL; corporate name change to IXL Learning Inc.; services provided by Plaintiff; discussion of Plaintiff's documents; Plaintiff's subscriptions; Plaintiff's marketing; Plaintiff's customers; Plaintiff's revenue, costs, and profits; Plaintiff's enforcement efforts; other testimony bearing on the lack of likelihood of confusion; Plaintiff's lack of damages.

13. Jennifer Gu:

Direct Examination: 0.75 hour

Cross Examination: 0.50 hour

Background on Plaintiff; background on www.ixl.com; services provided by Plaintiff; Plaintiff's subscriptions; discussion of Plaintiff's documents; Plaintiff's marketing; Plaintiff's revenue, costs, and profits; other testimony bearing on the lack of likelihood of confusion; and Plaintiff's lack of damages

14. Joseph Kent:

Direct Examination: 0.75 hour

Cross Examination: 0.50 hour

Background on Plaintiff; background on www.ixl.com; customer contacts and Plaintiff's various email addresses; services provided by Plaintiff; discussion of Plaintiff's documents; Plaintiff's subscriptions; Plaintiff's online activities; other testimony bearing on the lack of likelihood of confusion.

15. Jennifer Moss:

Direct Examination: 0.25 hour

Cross Examination: 0.25 hour

Testimony regarding IXL Learning Center's business, including its use of the name IXL; and knowledge of third party use of IXL, including the parties' uses of iXL and IXL.

16. Melissa Sell:

Direct Examination: 0.25 hour

Cross Examination: 0.25 hour

Testimony regarding IXL Learning Center's business, including its use of the name IXL; and knowledge of third party use of IXL, including the parties' uses of iXL and IXL.

17. Colin Drake:

Direct Examination: 0.50 hour

Cross Examination: 0.50 hour

1 As needed, testimony to authenticate and explain certain exhibits obtained from the
2 internet.

3 DATED: July 14, 2011

Respectfully submitted,

HOLMES WEINBERG, P.C.

MURPHY ROSEN MEYLAN & DAVITT LLP

7 By: /s/ Robert L. Meylan
8 Robert L. Meylan
9 Attorneys for Plaintiff and Counter-Defendant
IXL Learning, Inc. (formerly Quia Corporation)

10 Dated: July 14, 2011

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